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IN THE SUPREME COURT OF THE UNITED STATES

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MATTHEW ROBERT DESCAMPS, :

Petitioner : No. 11-9540

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Monday, January 7, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

DAN B. JOHNSON, ESQ., Spokane, Washington; appointed by this Court; on behalf of Petitioner.

BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 11-9540, Descamps v. United States.

Mr. Johnson.

ORAL ARGUMENT OF DAN B. JOHNSON

ON BEHALF OF THE PETITIONER

MR. JOHNSON: May it -- Mr. Chief Justice, may it please the Court:

In this case -- it doesn't matter what my client was convicted of in 1978, in the State of California. What's important for the Armed Career Criminal Act is what he's convicted of. And as we all know, when you're -- to be convicted of a crime, elements have to be proven beyond a reasonable doubt or agreed to by a defendant after waiving his constitutional rights.

In California, burglary -- unlawful entry as defined by the Court in Taylor on what a generic burglary consists of, is not an element of California burglary. Any entry with the intent to commit a crime, a theft, or a felony will do. A California jury is never required to actually find unlawful entry in the Taylor sense.

1 Regardless of the defendant's conduct, a
2 California burglary conviction is not, by its elements,
3 Taylor burglary for Armed Career Criminal Act.

4 JUSTICE GINSBURG: You don't take issue, do
5 you, with the argument that in -- in determining what
6 the State law is you can take account not only of the
7 words of the statute, but how the State Supreme Court
8 interprets those words?

9 MR. JOHNSON: I -- I don't take issue with
10 that, Your Honor. I think if the State's -- State
11 courts clearly state something is an element of a crime,
12 I -- you know, I agree with that.

13 JUSTICE ALITO: Well, the California Supreme
14 Court has said that an element of the burglary statute
15 is the violation of some possessory interest. Now, I
16 know there is some disagreement between you and the
17 government about that. But assuming for the sake of
18 argument that that is an element, one way for the
19 California court to express that is to say simply, as it
20 has, that an element is the violation of the possessory
21 interest.

22 Another way of saying exactly the same thing
23 would be to say that the term "enters" under the
24 California burglary statute means either breaking into a
25 structure or the violation of the possessory interest in

1 some other way.

2 MR. JOHNSON: Okay.

3 JUSTICE ALITO: Those are exactly
4 equivalent. Now, if they were to say the latter, would
5 a conviction under this statute potentially qualify
6 under the Armed Career Criminal Act?

7 MR. JOHNSON: Well, I don't believe it
8 would, because I don't believe possessory interest
9 equates to Taylor definition.

10 JUSTICE ALITO: No, but they -- they set out
11 alternative elements, either breaking into the structure
12 or the violation of the possessory interest in some
13 other way.

14 MR. JOHNSON: Well, if -- if the elements
15 are shown, and if that's the definition, then yes. But
16 I don't think California possessory interest is the same
17 thing.

18 JUSTICE ALITO: No, but they have said -- do
19 you dispute the fact that saying A, an element is the
20 violation of the possessory interest, and B, the
21 elements are breaking or the violation of the possessory
22 interest in same other way, are exactly the same
23 substantively?

24 MR. JOHNSON: I -- I don't, Your Honor,
25 because in the Taylor sense you have to have an --

1 unlawful -- trespass, actually a trespass, or an
2 invasion of a person's -- well, unlawful trespass. In
3 California you don't have to have a trespass. And as
4 the Court indicated in the Taylor decision, it talked
5 about shoplifting in the State of California. So is a
6 shoplifter someone who should be subject to an Armed
7 Career Criminal Act enhancement?

8 JUSTICE ALITO: I thought your argument was
9 that if the terms of the statute set out alternative
10 ways of satisfying an element, you have alternative
11 elements in essence, that then, even if some of those
12 alternatives don't fall within generic burglary, if one
13 does, then a conviction under that statute potentially
14 can qualify.

15 MR. JOHNSON: Well, I --

16 JUSTICE ALITO: Isn't that -- do you not --

17 MR. JOHNSON: -- I have no argument with
18 that.

19 JUSTICE ALITO: Okay.

20 MR. JOHNSON: That's the modified
21 categorical approach, I believe.

22 JUSTICE ALITO: Alright. Now, what if the
23 State Supreme Court says exactly the same thing? Your
24 answer to Justice Ginsburg was it doesn't matter whether
25 the elements are set out in the statute or whether they

1 are defined by the State court.

2 MR. JOHNSON: Well, I -- as I said, if -- if
3 the element is set forth and it's an element that meets
4 the definition of the generic definition in Taylor, then
5 I agree with you. But I don't believe California
6 burglary does that, because the entry with intent to
7 commit a crime is burglary in California.

8 JUSTICE ALITO: Well, I'll ask the question
9 one more time. Is there a difference -- what the
10 California court has said is that an element is the
11 violation of a possessory interest. Assuming for the
12 sake of argument that is correct, that is a correct
13 statement of California law, is there any substantive
14 difference between saying that and saying the element is
15 breaking or, in the alternative, the violation of a
16 possessory interest in some other way? Is there some
17 substantive difference between those two things?

18 MR. JOHNSON: Well, there may not be a
19 substantive difference, but in California breaking is
20 not required at any time. It's not an element of the
21 crime.

22 JUSTICE KAGAN: Mr. Johnson, can I try what
23 Justice Alito is getting at maybe in a slightly a
24 different way? And it's really the argument that the
25 Ninth Circuit made, which is that you can take any

1 indivisible statute -- indivisible statute, and you can
2 reimagine it as a statute with divisible elements, and
3 Justice Alito gave one example of that. And the
4 question to the Ninth Circuit says, is, once we've said
5 that we can look to Shepard documents when we have a
6 divisible statute, why not apply the same reasoning when
7 we have an indivisible statute, given that any
8 indivisible statute can kind of be reframed in our heads
9 as a divisible one?

10 MR. JOHNSON: Well, because in -- in that
11 case, the jury -- if a statute is made where the
12 question is, is a weapon involved, and you can commit
13 that with an ax, a gun, or a knife, but the element is
14 weapon, the jury is only required to find weapon. And
15 if gun is -- is the fact that needs to be shown for an
16 active -- predicate, you don't get there.

17 Again, you go back to the element, what's
18 the person convicted of. They'd be convicted of a
19 weapon violation, not a gun violation. And so, I -- I
20 suggest it's the same thing here.

21 JUSTICE SCALIA: But I thought our cases
22 held that when you have a conviction for a weapons
23 violation, you can look to the Shepard materials to
24 decide whether, in fact, the weapon violation was a gun,
25 a knife or an ax, can't you? No?

1 MR. JOHNSON: If the State's statute sets
2 off those as an alternative element, I would agree with
3 that. If they are not set out in an alternative
4 element, then I don't think they are -- I think they are
5 a manner and means of committing the crime. I don't
6 think they are an element of the crime.

7 JUSTICE SCALIA: Or if -- you acknowledge if
8 the State supreme court says "weapon" could mean a -- a
9 gun, a knife or a hatchet, that would -- that would
10 suffice, right? But if the supreme court doesn't say
11 that, we cannot imagine it?

12 MR. JOHNSON: Well, I -- if it's spelled out
13 as an element, I think you can, but if it's not an
14 element --

15 JUSTICE SCALIA: It's not spelled out as an
16 element, but the State supreme court says, our statute
17 says weapon. Of course, a weapon could be a gun, a
18 knife, or a hatchet, and then we look to the Shepard
19 documents and we find that this conviction of a weapons
20 violation was in fact based on the possession of a gun.

21 MR. JOHNSON: Again, I think it would go
22 back to the element of -- of weapon --

23 JUSTICE BREYER: The problem is there's no
24 way. This is purely conceptual. A State supreme
25 court that says the word "weapon" in the statute means

1 knife, ax, or gun. Now, are those three ways of
2 committing the crime? Or are they three crimes, each
3 with a separate element? That is -- we'd need not only
4 St. Thomas Aquinas, but I mean, we'd need those angels
5 dancing on the head of a pin.

6 There is no difference that I can imagine.
7 And therefore you are saying, look to the point of this
8 statute; it is not to look to the individual way in
9 which it was committed, and therefore go to the statute
10 to see whether you have a single crime or separate
11 crimes, okay? That's that's what I think your argument
12 is.

13 MR. JOHNSON: It -- it is.

14 JUSTICE BREYER: Do you think I understand
15 your argument?

16 MR. JOHNSON: I think you do.

17 JUSTICE BREYER: Fine. If I understand your
18 argument -- it's not as friendly a question as you might
19 hope--

20 (Laughter.)

21 JUSTICE BREYER: -- because what I want to
22 do next is say, why are we debating this point, because
23 the only difference I can see under the California
24 statute is shoplifting and even that one is sort of
25 debatable. And the very next clause of this statute

1 says "or otherwise," "or otherwise involves conduct that
2 presents a serious potential risk of physical injury."

3 So, why not forget about this metaphysical point
4 and say, look, even if you are totally right, you've
5 still got a statute for 430,000 convictions and as far
6 as we can tell there must have been fewer than 500 that
7 involved shoplifting, so this is so much like burglary,
8 that whatever risks were presented by burglary are
9 surely present here. So let's forget the metaphysics
10 and just go on to clause 2. Now, why hasn't anybody
11 done that? It's a mystery to me, because you haven't
12 and they haven't. So why not?

13 MR. JOHNSON: Well, it's not my burden to do
14 that. And -- I expected that question, but I think even
15 under -- under the residual clause we win the case.

16 JUSTICE BREYER: Why?

17 MR. JOHNSON: Because in California a
18 shoplifter is not -- but I would think --

19 JUSTICE BREYER: No, no, no. But I mean,
20 what I would do -- I've said this and nobody pays any
21 attention. I think Justice Scalia's said it; nobody
22 pays any attention. I think Justice Posner said it. He
23 said, look, under clause 2, these are really empirical
24 questions, is this dangerous or not. Let's do a little
25 sampling and what we'll do is we'll sample the kinds of

1 people that this particular State statute X get
2 convicted under and where a whole lot of them are
3 dangerous it's a dangerous statute; and where not, not.
4 And so nobody's done that sampling, but we do have some
5 numbers here and the numbers here suggest that this is
6 really a burglary statute.

7 MR. JOHNSON: Well, there's -- there's other
8 ways other than just shoplifting. There -- for example,
9 a mortgage broker going into a home with an invitation.

10 JUSTICE BREYER: Yes, you could. I just
11 don't think there are that many people who burgle their
12 own names or who go into the home of somebody else with
13 an invitation and then sneak into the cupboard and stay
14 overnight and burgle everything. I mean, there are some
15 such, but --

16 MR. JOHNSON: Doesn't it come back to the
17 test that this Court thought Congress meant when you
18 made the ruling in Taylor that we're not going to look
19 to the manner and means of commission, we're going to
20 look at the elements --

21 JUSTICE BREYER: No, no, no. It doesn't
22 have to do with that. It has to do with the crime and
23 the crime is the crime that the statute defines. And
24 the question is, is that crime otherwise -- present a
25 serious potential risk of physical injury? And if 4,000

1 manifestations of that crime it does, and 3
2 manifestations of that crime it doesn't, you would say
3 the overall judgment here is this is a crime that does
4 present that dangerous risk. That's because in almost
5 all cases it's there.

6 MR. JOHNSON: Well, if the Taylor definition
7 -- after the Court worked that through, I think the
8 Taylor went with the categorical elements approach. I
9 think what you're talking, Your Honor, is -- is a
10 different approach.

11 JUSTICE BREYER: No, no. It's exactly pure
12 categorical. You have a crime in a statute. You don't
13 know how dangerous it is. It is not burglary, arson or
14 explosives. So to find out if it presents the same kind
15 of danger you do a little empirical research. That's
16 all I'm saying. It has nothing to do with categorical.

17 MR. JOHNSON: But then why do we have the
18 "is burglary" language and the other sentences? Don't
19 they get eaten up by that?

20 JUSTICE BREYER: "Is burglary or otherwise,"
21 "or otherwise," "burglary or otherwise," and the reason
22 we have "or otherwise" is because Congress does know
23 that the number of State statutes that are sort of like
24 something, but not completely like something is in the
25 thousands. And so that's why they put in "or

1 otherwise."

2 MR. JOHNSON: I think in this case one of
3 the -- one of the considerations that drives our
4 argument is that if you get into that factfinding mode
5 of manner and means in order to establish an element
6 that is not in the State statute, which is in the case
7 we're looking at here, I think you got an Apprendi
8 problem, and I think under the Sixth Amendment my client
9 should have had a right to a jury trial and proof beyond
10 a reasonable doubt.

11 He went from a max 10 to a max of life and a
12 mandatory min of 15 years, based on what I -- we contend
13 is factfinding in violation of Apprendi.

14 JUSTICE KENNEDY: Suppose the Court were to
15 say, we now hold that the modified categorical approach
16 applies to this statute and to these facts. Would the
17 plea colloquy suffice to show that under the modified
18 categorical approach the defendant necessarily was
19 convicted of a crime that's equivalent to the generic
20 crime of burglary?

21 MR. JOHNSON: Well, I think the breaking
22 under the -- under the California statute is a manner
23 and means of committing the crime. It's not an element
24 of the crime, because you don't have to --

25 JUSTICE KENNEDY: But if he necessarily --

1 MR. JOHNSON: -- do that.

2 JUSTICE KENNEDY: -- the defendant
3 necessarily was convicted of an offense that had the
4 elements of a generic crime, if he necessarily was
5 convicted of that, would that suffice? And if it would,
6 does the -- plea colloquy suffice to show that?

7 MR. JOHNSON: That's kind of a two-part
8 question.

9 JUSTICE KENNEDY: It is a two-part question.
10 I hope I can get an answer to each.

11 MR. JOHNSON: Well, the first question is,
12 because the breaking is not part of California
13 requirement, a jury's never required to find that as an
14 element. Nor does a judge when he's taking a plea have
15 to -- to find that having taken place.

16 JUSTICE KENNEDY: But if under the modified
17 categorical approach we -- we insist that in the
18 particular case before us the generic components of the
19 crime must necessarily have been found by the jury, and
20 if we say that that's the rule, that's inconsistent with
21 your view of what the law ought to be?

22 MR. JOHNSON: I think -- I think it would
23 be, because I think unless it -- unless it -- there are
24 alternatives in the statute, some of which constitute
25 the generic crime and some of which don't, I don't think

1 you can use a modified categorical approach.

2 JUSTICE SCALIA: I think what you're saying
3 is, it -- it could necessarily have been found by the
4 jury, but he would nevertheless not have been convicted
5 of that particular crime.

6 MR. JOHNSON: That's obviously a more --

7 JUSTICE SCALIA: The jury in finding him
8 guilty of the generic offense could only have found that
9 this mode of committing the offense was what he used.
10 Nonetheless, he has not been convicted of using that
11 mode; he has been convicted of the generic offense.
12 Isn't that your point.

13 MR. JOHNSON: Exactly true. Just like an
14 example would be in a plea bargain context the
15 prosecutor charges a person with delivery of a
16 controlled substance, maybe there is a problem with the
17 search or something and they come up with a plea bargain
18 of possession of a controlled substance. Are we going
19 to 30 years later go back and say, well, the colloquy
20 said this person did do a delivery, so we are going to
21 punish him as if he did?

22 JUSTICE KENNEDY: But under the modified
23 categorical approach the whole point is that we do look
24 to the plea colloquy.

25 MR. JOHNSON: You look to the plea

1 colloquy --

2 JUSTICE KENNEDY: Of course, which is why
3 you say you don't think the modified categorical
4 approach should apply. But I'm saying suppose we say
5 that it does and we look at the plea colloquy. What do
6 you want us to conclude from that?

7 MR. JOHNSON: Even if you say it does, it
8 still doesn't -- it's not an element of the crime.

9 JUSTICE SOTOMAYOR: Could you simplify that?
10 Could you simplify that? What do you think the elements
11 of -- just going back to what Justice Scalia said, as I
12 understand your position the elements of a burglary in
13 California law is being in a place with the intent to
14 commit a crime. Whether you got there with permission
15 or without permission, unlawfully or not, is irrelevant.
16 So what you are saying is what he pled guilty to was
17 being in that garage with the intent to commit a crime,
18 correct?

19 MR. JOHNSON: Yes. In California you --
20 just entry with intent is all you need, with intent to
21 commit.

22 JUSTICE SOTOMAYOR: But the unlawfulness is
23 not necessary.

24 MR. JOHNSON: It's not necessary and that's
25 the point --

1 JUSTICE SOTOMAYOR: No matter what he said,
2 he wasn't convicted of a generic crime because all he
3 was convicted of under California law was entering
4 and --

5 MR. JOHNSON: Exactly.

6 JUSTICE SOTOMAYOR: -- with intent. That's
7 your point.

8 MR. JOHNSON: And the manner and means of --
9 of committing it isn't the point. It's what are you
10 convicted of. And again, I think unless the Court
11 decides to change that approach, I think we're going to
12 have an Apprendi problem.

13 JUSTICE ALITO: But your argument comes back
14 to how the elements are defined. It comes back -- so in
15 your view, what is critical is in a case of a broad
16 statute -- whether the statute simply sets out a broad
17 category or whether it sets out lots of subcategories,
18 that's what your argument comes down to.

19 If the court says -- if the California
20 legislature or the California court says, the element is
21 entry, period, that's one thing. If they say the
22 element is breaking or entering in some other way,
23 that's something entirely different. It all comes down
24 to that, in your view.

25 MR. JOHNSON: Well, it may -- it may come

1 down to what -- what the Court thinks California means
2 by invasion of a possessory interest. But again, I just
3 -- I don't see invasion of a possessory interest as the
4 equivalent of Taylor entry.

5 JUSTICE BREYER: Because it's like the old
6 joke. I mean, it's in the statute, you are looking back
7 to see whether he was charged with possession of a gun,
8 which is one word in the statute, or an ax, or a knife.
9 That's what we're looking for under the categorical --
10 modified categorical. But if all it says in the statute
11 is weapon, even if the supreme court says it's a gun, a
12 knife, or an ax, you still have nothing to look for.
13 Because the charge to the jury could have been, did he
14 have a gun, a knife, or an ax, and the answer to that
15 question, when the jury comes back, would be yes. You
16 see?

17 All they have to say is yes. They don't
18 have to say which. And therefore, Apprendi would be
19 violated, in your view.

20 MR. JOHNSON: That's correct. I think that
21 sums it up.

22 JUSTICE ALITO: Well, if that's your
23 argument, then you're really asking for us to modify our
24 prior cases. Because I thought it was clear, that if
25 the element -- if the statute requires -- if to qualify

1 under ACCA, you have to have a gun. And the statute
2 says that you have to have a weapon, and a weapon is
3 defined as a gun, a knife, or a hatchet, that would be
4 okay. Is that wrong? Isn't that your -- don't you
5 agree with that?

6 MR. JOHNSON: If the predicate element is
7 included in the -- in the statute or the decision, I
8 agree with that. But again, I don't think I have to --

9 JUSTICE ALITO: So your answer to
10 Justice Breyer was not yes; it was no.

11 MR. JOHNSON: Maybe I misunderstood the
12 question. But I think the --

13 JUSTICE BREYER: You didn't.

14 JUSTICE GINSBURG: Let's -- let's get back
15 to this case. I think what you're saying about the plea
16 colloquy is, even if he had said to the judge, yes, I
17 broke and entered the Metro Mart, even if he had said
18 that, the conviction still would not be for burglary.

19 MR. JOHNSON: The conviction is just for
20 entry, and for the entry with intent, which again isn't
21 how this Court defined burglary in Taylor. And so --

22 JUSTICE KAGAN: And so your principal
23 argument isn't that -- is that what we've said in the
24 modified categorical cases is that you look to these
25 Shepard documents to help you define the elements of the

1 offense. So if you're not sure which offense the person
2 has been convicted of, you look to the Shepard documents
3 to do that. But you don't look to the Shepard documents
4 for a different purpose, which is, we know what the
5 elements of the offense are, but we want to know whether
6 this person also committed the generic offense.

7 MR. JOHNSON: Yes. Yes. I agree with that.
8 And -- but the government wants you to use the Shepard
9 documents to go beyond that.

10 JUSTICE KAGAN: Yes, I think -- here's, I
11 guess, the rub, which is -- you know, I take the point
12 that what the Ninth Circuit has said does not seem very
13 categorical. It doesn't seem categorical, it doesn't
14 seem modified categorical. But there is something a
15 little bit insane about your position. I don't see --
16 you take the most populous State in the country and
17 everybody who's convicted of burglary, in the most
18 populous State in the country, is not going to have
19 committed an ACCA offense, even though, as Justice
20 Breyer suggested, 98 percent of them really have.

21 MR. JOHNSON: There's an -- there's an easy
22 way to fix that. A State legislature can change their
23 law, if they want to. The Congress can change the
24 approach they want to take, and that would -- that would
25 solve that problem. But I don't think it's up to the

1 Court to change 22 years of jurisprudence to do that.
2 California has known this for over 22 years. These
3 problems have been -- have been around and percolating,
4 and the right to a jury on -- on issues of fact --

5 CHIEF JUSTICE ROBERTS: But it's not
6 California's problem, right? We're talking about
7 Federal legislation and how that operates.

8 MR. JOHNSON: I agree. So Congress can
9 amend the statute if they wish, as many members of the
10 Court have talked to the Court and asked the Court to
11 do. But in light of how I believe this Court interprets
12 the law, and the categorical approach, and the idea was
13 that using the modified categorical approach would only
14 apply in a narrow set of circumstances, the
15 California -- or the Ninth Circuit's version is not a
16 narrow set of circumstances.

17 Arguably, it's just about any crime that
18 comes in -- later on, sometimes decades later, they're
19 going to be doing fact-finding on issues, some of the
20 participants might have passed away. I mean, all kinds
21 of things like that. It's not fair to the -- to a
22 defendant under those circumstances that that kind of
23 fact-finding is going to take place and result in the
24 egregious extra penalties he's looking at unless he has
25 a jury trial.

1 Those aren't facts of the conviction. They
2 are facts about the conviction. I think that's the
3 difference between the Ninth Circuit's approach and what
4 all the other circuits have. I think the other circuits
5 get it. They get the idea modified categorical should
6 be narrow.

7 JUSTICE GINSBURG: There's -- there's
8 probably an obvious answer to this, but the Taylor
9 definition of generic burglary is unlawful entry into or
10 remaining in a building with intent to commit a crime.
11 Why doesn't this, the crime of which the defendant was
12 convicted, satisfy the remaining, the remaining in the
13 building with intent to commit a crime?

14 MR. JOHNSON: Well, California burglary
15 is -- I believe, in my reading of the case law, it's --
16 the -- the intent is formed as you enter the premises.
17 And that's when the burglary's been committed. If --
18 for example, that's the way I read the case law.

19 JUSTICE GINSBURG: That -- that intent would
20 continue while the person remains in the building.

21 MR. JOHNSON: Well, except the -- again, is
22 it the intent in the generic sense, or is it the intent
23 in the California sense? And I suggest there's a
24 difference, because again, I don't believe -- invading a
25 possessory interest, I think that came up when someone

1 was convicted, or they tried to convict them of
2 burglarizing their own home, and the person had a
3 possessory interest so they said oh, you can't be guilty
4 of that. I just -- I don't think possessory interest
5 equates to the generic Taylor element.

6 And I would like to reserve my time, if I
7 might.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Horwich.

10 ORAL ARGUMENT OF BENJAMIN J. HORWICH
11 ON BEHALF OF THE RESPONDENT

12 MR. HORWICH: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 I would like to start maybe at a point in a
15 colloquy that my friend was having with Justice Breyer,
16 which brought out the point that Petitioner's position
17 here is that there's a difference between alternative
18 elements in State crimes and alternative means; and from
19 the point of view of a guilty plea, which is what we're
20 dealing with here, I don't see how you're going to make
21 that sort of distinction.

22 It's an unworkable distinction, because,
23 from -- from the point of view of the defendant pleading
24 guilty, whether it's an alternative element or an
25 alternative means, it's just an alternative way of

1 offering the factual basis for the crime. And the
2 sentencing court ought to look, as the Court, as this
3 Court said in Shepard, to the factual basis that's
4 offered for pleading guilty.

5 JUSTICE BREYER: But you're not -- but
6 you're not looking at the factual basis for the purpose
7 of deciding the manner in which the defendant committed
8 the crime. You're looking to the factual basis or you
9 look to these other documents in order to decide which
10 crime it was that the offender committed.

11 And the reason that you have to sometimes do
12 that is because there are many State statutes which
13 under a single section number list several different
14 crimes, where "crime" here does not refer to a thing
15 that happened at a particular day at a particular time,
16 but refers to the kind of thing that a statute defines;
17 i.e., a general category.

18 Now, every case that we've written it seems
19 to me says that or is consistent with that. And that is
20 certainly consistent with the idea of the crimes being
21 burglary, arson, explosives, or other dangerous crimes.
22 So the guilty plea is beside the point. It may just
23 say, guilty of 828 376 Section 42-BC, end of the matter.

24 And we don't know which of those three
25 things: House, car, boat, which are there in that

1 section, was the crime committed. And he's saying
2 that's the end of that. And so he says, then, look,
3 this is a California State statute and it isn't divided
4 into three parts. It just has one part. And that one
5 part is not the equivalent --

6 MR. HORWICH: I think that --

7 JUSTICE BREYER: -- of Federal burglary as
8 defined by Justice Blackmun and the Court in this case,
9 end of matter, QED.

10 MR. HORWICH: I -- I do think you've
11 accurately described what Petitioner -- the dividing
12 line the Petitioner would advocate is. But I would urge
13 the Court to look at the experience of the court of
14 appeals with trying to apply that dividing line, and
15 that will reveal to the Court very clearly why it
16 becomes unworkable. Because we've got several courts of
17 appeals -- as the Court's aware there's a division of
18 authority on this -- that have said, well, look, we want
19 to look for statutes that are phrased in the disjunctive
20 or that have these separately numbered subsection
21 headings or something.

22 Now, setting aside whether that's really
23 principled or not to focus on the text versus the
24 judicial decision, let's accept for the sake of argument
25 that that's the line. The problem is that then the next

1 case that those courts confront, that applying that rule
2 rigidly produces really strange results.

3 JUSTICE BREYER: That's exactly right. So
4 therefore, that was my question basically.

5 MR. HORWICH: Yes.

6 JUSTICE BREYER: And of course Congress knew
7 that there are hundreds or thousands of State statutes
8 with several different words and they -- you know,
9 different ways of getting at the same thing, and
10 therefore they wrote the next phrase of their Federal
11 statute, which is it's burglary, arson, explosives or
12 otherwise, or otherwise involves conduct that presents a
13 serious potential risk of physical injury.

14 And so if you have a slight variation on the
15 burglary theme, it doesn't fit within generic burglary,
16 but it's pretty hard to imagine it wouldn't otherwise
17 present the same risks, at least if it's only a slight
18 variation.

19 MR. HORWICH: Well, I -- the parties have
20 not briefed here and I wouldn't want to speculate
21 on what the Court would --

22 JUSTICE BREYER: I know and that was my
23 question. Why not?

24 MR. HORWICH: Well, this case has been
25 argued as -- because this is a conviction under

1 California burglary, it's been argued under the -- the
2 premise that it should be classified as generic
3 burglary. But let me offer --

4 JUSTICE SCALIA: Maybe -- maybe they haven't
5 argued it because there's some serious constitutional
6 doubt about whether the statute which makes it a crime
7 to engage in conduct which creates a serious risk of
8 physical injury is constitutional. That's such a vague
9 standard, you go to prison for 30 years if you engage in
10 conduct, quote, "that creates a serious risk of physical
11 injury." I'm not about to buy into that one.

12 MR. HORWICH: That -- that's -- I understand
13 Your Honor's view on that, on that subject.

14 JUSTICE KAGAN: Mr. Horwich --

15 MR. HORWICH: If I can try to --

16 JUSTICE KAGAN: I'm going to ask you about
17 an argument you did make.

18 MR. HORWICH: Yes.

19 JUSTICE KAGAN: As I understand your
20 argument, your argument is not the Ninth Circuit's
21 argument, because you very carefully distinguish what
22 are what you call missing elements cases from this case.

23 MR. HORWICH: Yes.

24 JUSTICE KAGAN: So do you reject the Ninth
25 Circuit's view that the categorical approach should

1 apply even where there is a missing element, as you --
2 as you call it?

3 MR. HORWICH: Well, I want to be very
4 careful that we're talking about the same thing, when we
5 say "missing element." And so maybe I can give -- give
6 an example of what I think is a missing element case and
7 one to which we do not think the modified categorical
8 approach can be applied.

9 And -- and the good way to think about the
10 exercise that we think a sentencing court should be
11 engaged in here is to say, imagine there's a set of
12 boxes on one side that correspond to the elements of the
13 generic offense -- excuse me -- of the State offense,
14 and then on the other side a set of boxes that
15 correspond to the elements et of the generic offense.

16 And the exercise is to go through the
17 Shepard materials and figure out what goes into those
18 boxes or what went into those boxes on the State side to
19 establish a basis for the previous conviction. And then
20 you take whatever was put in those boxes, be it specific
21 or general or whatever it is, and then see if those
22 things give you enough to fill in the elements of the
23 generic offense.

24 Now, in a case that we would call a missing
25 element case, let's take, for example, because we're

1 talking about burglary, let's talk about criminal
2 trespass. So criminal trespass let's assume is defined
3 as the unlawful entry of a building or structure,
4 period. And there's no provision that you have to have
5 intent to commit a crime. Now, it doesn't matter what's
6 in the Shepard materials for someone who pleads guilty
7 to criminal trespass, because there's no way you're ever
8 going to get something in one of those boxes about
9 unlawful entry or structure that's going to let you fill
10 in the generic box.

11 JUSTICE KAGAN: Let me give you a -- let me
12 give you a different kind of example. Let's suppose you
13 have a statute that's made it illegal to interfere with
14 a law enforcement investigation. And you're prosecuting
15 somebody, maybe the person is pleading, maybe he goes to
16 trial; it doesn't matter. The theory of the case is
17 that the defendant violated this statute, interference
18 with a law enforcement investigation, by assaulting a
19 police officer, okay? Is that a missing elements case
20 or is that what you think is going on here, which is
21 just -- it's just an overbroad statute?

22 MR. HORWICH: Well, we would need to know --
23 I guess I would need to know in your hypothetical
24 what -- what we're trying to classify that conviction
25 as, because --

1 JUSTICE KAGAN: The conviction is
2 interference with a law enforcement investigation.
3 That's the statute. But interference with a law
4 enforcement investigation can be done in extremely -- it
5 can be done in an extremely violent way, which would be
6 an ACCA offense or not.

7 MR. HORWICH: Well --

8 JUSTICE KAGAN: And it's overbroad. There
9 are ACCA offenses in it, but there are also non-ACCA
10 offenses in it.

11 MR. HORWICH: Well, I'm sorry. I guess
12 my -- my -- my concern is -- is that I would need to
13 know what generic enumerated crime we're trying to fit
14 that into, because although perhaps that could be
15 classified under the residual clause --

16 JUSTICE KAGAN: Sure.

17 MR. HORWICH: Well, that might raise a -- I
18 think that raises a different set of questions. I want
19 to be clear that our argument here at this point is only
20 that the Court should accept this for purposes of
21 dealing with the enumerated -- with enumerated offenses.

22 JUSTICE KAGAN: Well, why would there be any
23 difference between those two? Why would you take your
24 argument differently from the residual clause than in
25 the enumerated crimes?

1 MR. HORWICH: Well, I think because the way
2 this Court's clause jurisprudence has evolved, it
3 requires the Court to make some assessment of the degree
4 of risk of some set of conduct that's not too much more
5 serious than what the defendant engaged in, but not too
6 much less serious and so I don't know what that
7 reference point is. I mean, there's something of that,
8 I think in -- in -- in Your Honor's disagreement with
9 the majority in the Sykes case, I think of, trying to
10 figure out what the right frame of reference to draw is.

11 So I think residual clause cases are a very
12 difficult context in which to -- to talk about
13 hypotheticals here, and for that reason, I -- I would --
14 I would -- I think it's more productive to try to assign
15 them to burglary or one of the other generic offenses.

16 If I can give an example --

17 JUSTICE KAGAN: Okay. Well, let me -- let's
18 talk about this case, then. I mean, I'm not sure I
19 understand that quite. But let's talk about the
20 burglary. Suppose that there was a State that just said
21 entry. In other words, this State says unlawful entry
22 and you say that's overbroad, but we're still in sort of
23 the same universe of an element. Suppose the State just
24 said entry. Would we be in a missing element world or
25 in an overbroad world?

1 MR. HORWICH: If the State statute provided
2 that all entries qualified, which is what I understand
3 your hypothetical to be, then I think that probably
4 amounts to a missing elements situation, because -- and
5 I'm taking the Court's test from Shepard here. The
6 question is what did the defendant necessarily admit in
7 the plea colloquy. And there may be -- I want to be
8 clear -- there may be any number of things that are in
9 the Shepard materials that are noted in the plea
10 colloquy, but if they are not offered as the legal basis
11 for the defendant's conviction, then they don't make it
12 into those boxes that I was talking about and they don't
13 make it into being a basis for the generic offense.

14 JUSTICE SOTOMAYOR: But that's my problem,
15 which is you say that, but how to define a missing
16 element from an alternative element is -- overbroad
17 element, doesn't make any sense to me. As I read the
18 California statute, all it says is you have to enter a
19 number of defined things with the intent to commit a
20 crime. It doesn't talk about whether the entry itself
21 is unlawful. That's your colleague's -- your opponent's
22 argument. But you're trying to read into the method of
23 entering that it could be legal or illegal, and so you
24 look at the documents to add that.

25 MR. HORWICH: Well, I don't think -- no, I

1 don't think we're trying to add that. I agree that
2 if -- if -- if, for example, the California Supreme
3 Court's decision in Gauze had come out the other way and
4 said, yep, it's your own home -- you know, so what. As
5 long as you're entering, the statute literally says
6 "entry," there's no -- there's nothing further we need
7 to examine, then I agree this would be -- you could call
8 it a missing element case.

9 But the problem with Petitioner's position
10 about California law is that that's not California law.
11 Petitioner says -- I wrote this down, any -- he says,
12 "Any entry with intent to commit a crime will do." That
13 is not true. You can enter your own house with the
14 intent to commit a crime. That is not burglary in
15 California. You can enter somebody else's house with
16 the intent to commit a crime and that's not burglary if
17 they know you intend to do that.

18 JUSTICE BREYER: True. But what they said
19 in Gauze is that the entry must invade a possessory
20 right in a building. And that cuts in your favor,
21 because that's not having different ways of committing a
22 crime, that's what the word in the statute means.

23 MR. HORWICH: Yes.

24 JUSTICE BREYER: Yes. So now you're ahead.
25 But the difficulty I think is, as I understand it, that

1 invading a possessory interest includes -- includes
2 going into a shop with an intent to steal something, a
3 shoplifter. Now, you could go back to the Blackmun
4 opinion and you can say, ah, that falls right within it,
5 because generic burglary is defined in part there to
6 include generic, an unprivileged remaining in the
7 building. And you say, you see, these are the same.

8 Were it not for two facts. The first fact
9 is in Shepard it seems as if the Court says shoplifting
10 is not burglary. And then you look to the treatise that
11 they cite for that, which is LaFave, and LaFave makes
12 that even more clear. And says, no, when you talk about
13 remaining, what we're thinking of is hiding in a bank
14 and not going into what used to be Jordan Marsh and
15 staying overnight, or not even staying overnight, but
16 just putting a few toothbrushes in there.

17 MR. HORWICH: We certainly agree that --

18 JUSTICE BREYER: So that's where the problem
19 is.

20 MR. HORWICH: We absolutely agree that --
21 that the shoplifting basis for California burglary does
22 not correspond to generic burglary. But by the same
23 token we also agree that the burglary of an automobile
24 version of California burglary --

25 JUSTICE BREYER: Ah. But now, once you

1 conflate those you are back to Justice Sotomayor's
2 problem.

3 MR. HORWICH: Well, I don't think we're
4 back to -- I don't think we're back to -- I don't think
5 we're back to any real problem here, because the -- the
6 Court should not be seeking a rule here that turns on
7 some idiosyncrasy of how State law is phrased or
8 announced. The Court should be looking --

9 JUSTICE SOTOMAYOR: So how do you take that
10 position and advocate the answer you're giving here?
11 Because you are asking us to determine or to have courts
12 below determine what are or are not definitions that the
13 judiciary is applying to means versus mode, et cetera?

14 MR. HORWICH: Well, we're not asking the
15 Court to draw any distinctions among those. I guess
16 what -- what I'm saying is the government's test is --
17 is that in applying the modified categorical approach to
18 a conviction entered upon a guilty plea, the Court
19 should be looking at what the -- what the legal basis
20 for the prior conviction was, which is, in the words of
21 Shepard, "the matters" -- "the factual matters the
22 defendant necessarily admitted." That's -- that's what
23 Shepard says. And Shepard -- Shepard draws an
24 analogy --

25 JUSTICE KAGAN: But this reading creates its

1 own idiosyncrasies. I mean, suppose the same plea
2 colloquy had taken place and the prosecutor, instead of
3 saying -- you know, the defendant broke and entered, he
4 had said, the defendant unlawfully entered, right?
5 Completely different result under your theory; isn't
6 that right?

7 MR. HORWICH: Yes, it is a different result.
8 But let me explain why that is -- that's not actually
9 germane to the dispute that we're having here, because
10 the prosecutor equally could have said, he broke and
11 entered one of the places enumerated in the statute.
12 And that too would have been vague and that wouldn't
13 have allowed the sentencing court to classify it as
14 generic burglary.

15 That -- the possibility that the Shepard
16 records are insufficiently precise or they're too opaque
17 or that they just don't exist because they've been lost
18 is something that can frustrate the application of the
19 modified categorical approach regardless of whether we
20 are talking about cars versus --

21 JUSTICE KAGAN: I think it's -- I think it's
22 a deeper problem than that, because the defendant is
23 standing there and he doesn't care at all whether the
24 prosecutor says unlawfully entered or broke and entered.
25 It doesn't matter a whit to him. And so -- and so

1 something is -- is --

2 MR. HORWICH: But --

3 JUSTICE KAGAN: -- the difference between an
4 enhanced sentence and not an enhanced sentence that is
5 not likely to be thought about, let alone adjudicated.

6 MR. HORWICH: Well, by the same token, the
7 defendant would not care a whit whether it really was a
8 grocery store or it was a car, because those two would
9 also cause him to be convicted of the same -- of the
10 same burglary offense under California. But they would
11 lead to different results for classifying the prior
12 conviction. The point --

13 CHIEF JUSTICE ROBERTS: The point would
14 expand -- this would expand the problem that you've
15 identified, that the Shepard approach, the existence of
16 the documents, how carefully they've been developed, it
17 would expand that fortuity to a far greater number of
18 cases.

19 MR. HORWICH: I guess I am not prepared to
20 make a confident prediction about the relative number of
21 cases. It certainly would be more cases, but I think
22 that we would be expanding it that way in an effort to
23 assure greater sentencing equity. It seems very strange
24 to me that you could have had someone engage in exactly
25 the conduct the Petitioner did, but in another State,

1 come into court, have exactly the same guilty plea
2 colloquy, be convicted of that State's version of
3 burglary, and then it does count, but it doesn't count
4 in California. For some reason -- for a reason that it
5 has --

6 CHIEF JUSTICE ROBERTS: The -- I'm not sure
7 that it achieves greater sentencing equity when you have
8 two defendants who have done exactly the same thing in
9 California, and because of the fortuity of what the plea
10 colloquy looked like in one case as opposed to another,
11 when it really didn't matter one way or another in that
12 situation, one person qualifies under ACCA and the other
13 doesn't.

14 MR. HORWICH: That -- that --

15 CHIEF JUSTICE ROBERTS: And presumably I
16 agree that you don't have -- you don't have empirical
17 evidence. But given how -- it does seem to me that it's
18 a broad expansion of the category of cases to which you
19 would apply the modified categorical approach under your
20 position.

21 MR. HORWICH: Well, in part I'm not -- well,
22 in part I'm not even sure of that. If I can return to
23 the experience of the courts of appeals in this and give
24 some examples where the courts of appeals that might
25 have preferred to stick to these rules about looking for

1 the word "or" in the statute or looking for separately
2 numbered subsections and then they confront cases like
3 the statutory rape example in our brief, where the State
4 statute of conviction provides that the victim of a
5 statutory rape has to be under the age of 18, but maybe
6 the generic offense says that the victim has to be under
7 the age of 16.

8 Now, that element of age isn't phrased in
9 the disjunctive, but it seems very strange that if the
10 defendant admits to his victim being under -- age 14,
11 that we wouldn't recognize that.

12 Or you have the situation in the Seventh
13 Circuit, that just about a year after it decides the
14 Woods case in which --

15 JUSTICE SCALIA: It seems strange to me at
16 all. He hasn't been convicted of raping or having
17 intercourse with somebody under -- under 14 or under 15.

18 MR. HORWICH: Well, the question --

19 JUSTICE SCALIA: He's only been convicted of
20 having that with someone under 18.

21 MR. HORWICH: Well, let's imagine for the
22 moment that his case had been tried to a jury. Now, the
23 instructions might have said, do you find that the
24 victim is under the age 18 -- under the age of 18? But
25 let's for the sake of argument say that the instructions

1 -- the instructions provided: Was the victim age -- do
2 you find that the victim was age 14?

3 Those would be perfectly valid instructions,
4 and if that was what the jury found then we would say in
5 the Taylor sense that that was what the jury was
6 actually required to find.

7 JUSTICE SCALIA: Not everything the jury
8 finds constitutes a conviction. They have to find
9 something that is an element of the charged offense.

10 MR. HORWICH: Well, the text --

11 JUSTICE SCALIA: If being -- being under 16
12 is not -- or 14, whatever it is, is not an element of
13 the charged offense, I don't care what the jury finds.

14 MR. HORWICH: Well, with respect, Your
15 Honor, the text of the statute in this part of it does
16 not refer to elements. There is a part that refers to
17 has as an element the use of force or that sort of
18 thing. But here the relevant text of the statute asks
19 the Court to determine does the defendant have a
20 previous conviction for a crime that is burglary. Here
21 the defendant has a previous conviction for breaking and
22 entering a grocery store, that's the basis on which he
23 was convicted, and breaking and entering a grocery
24 store is generic burglary.

25 JUSTICE GINSBURG: But breaking and

1 entering -- in your brief as I understand it you are not
2 relying on the prosecutor's charge that there was
3 breaking and entering. You're relying entirely on the
4 plea colloquy. And in this plea colloquy, the
5 prosecutor said, he broke and entered a grocery store.
6 He says nothing. In the typical Rule 11 setting, when
7 the judge goes through the series of questions, the
8 judge doesn't take the defendant's silence. The
9 defendant has to positively affirm. And here we have a
10 plea colloquy where the prosecutor says something and
11 the defendant doesn't respond.

12 Why is that any kind of a necessary
13 admission when he said nothing, which he might have done
14 under the impression that it doesn't matter because he
15 had the intent to commit a crime?

16 MR. HORWICH: Well, the -- the defendant's
17 statement -- well, in the context of this plea, it is
18 true that the words didn't come out of the defendant's
19 mouth. Of course, at a proceeding like this one can
20 fairly understand, as the Ninth Circuit has and other
21 circuits do, understand that those factual bases are
22 adopted by the Court precisely because the defendant
23 does not say anything contrary to -- and of course --

24 JUSTICE GINSBURG: Why should it be
25 different than in the Rule 11 colloquy? Why shouldn't

1 there be -- if -- if this is going to determine whether
2 there's a crime qualifying under ACCA, why should it be
3 enough that the prosecutor said something? Why
4 shouldn't the defendant have to say, yes, I broke and
5 entered the grocery store?

6 MR. HORWICH: Because we can treat --
7 because we can treat the proceeding in this colloquy as
8 the defendant adopting that factual basis offered by the
9 prosecutor, accepted by the court.

10 JUSTICE SCALIA: Qui tacet consentire
11 videtur. Why don't you quote the maxim?

12 (Laughter.)

13 MR. HORWICH: Because your Latin is better
14 than mine. But, I expect --

15 (Laughter.)

16 JUSTICE SCALIA: He who remains silent
17 appears to consent.

18 MR. HORWICH: Yes. This is at the most --
19 this is -- this of course is at -- at one of the most
20 important moments in the criminal process here. This is
21 essentially the defendant confessing his guilt and
22 accepting punishment from the court. So it -- it seems
23 that it's fair to accept that when a basis is offered
24 for his conviction -- and he is silent --

25 JUSTICE KAGAN: I guess it depends on

1 whether the basis has any relevance to the punishment
2 he's going to receive, which in this case it doesn't,
3 but put that aside.

4 Here's one thing that strikes me as odd
5 about your position. You said before in response to a
6 question -- you said if the California Supreme Court had
7 not decided Gauze, then you would not be up here arguing
8 what you're arguing.

9 MR. HORWICH: Well, at least if it was
10 different, yes.

11 JUSTICE KAGAN: Yes, if there were -- if
12 there were no unlawful entry that counted under
13 California law --

14 MR. HORWICH: Yes.

15 JUSTICE KAGAN: -- but -- you know, the fact
16 that there is a strange Gauze case which says that you
17 can't burglarize your own home -- right -- the fact that
18 the Court happens to come across that case and happens
19 to decide -- it seems completely irrelevant as to this
20 matter whether or not the California court once decided
21 that you can't burglarize your own home. What does that
22 have to do with anything in this case?

23 MR. HORWICH: Here's -- here's the relevance
24 of it. It's because at common law, of course, there was
25 a strict breaking requirement, and as this Court

1 recognized in Taylor, and in going back to the LaFave
2 treatise in -- in Taylor, that requirement had over the
3 years and into modern statutes been relaxed to include
4 not only strict breakings, but also entries by fraud,
5 entries by threat and so forth.

6 Gauze -- and the reasoning in Gauze explains
7 that the California legislature's codification of
8 burglary simply does that relaxation a little bit
9 better, by adding essentially one more category of
10 Gauze -- taken with subsequent decisions about
11 shoplifting and such -- explains California just did
12 that one better by adding another category, which is
13 entries that exceed the implied consent to enter public
14 places for lawful purposes.

15 So what you're left with here is, this case
16 exists at the -- the common law core that both
17 California and generic burglary retain, which is an
18 entry by break -- an entry by breaking. And it is true
19 that both generic burglary is dispensed with that
20 requirement, in the sense that it allows other thing to
21 qualify, and so, too, California has dispensed with that
22 requirement, but it hasn't completely eliminated the
23 relevance entirely of the lawfulness of the entry.
24 There's still a question there. It's simply easier to
25 satisfy it --

1 JUSTICE BREYER: Let me quickly ask you this
2 then, you say look at Gauze for this reason, it makes
3 clear that in these words of the California statute,
4 there must be an interference with possessory interest.
5 Now, I go back and read the Blackmun opinion, and it
6 says the element of generic burglary includes an
7 unprivileged entry or remaining into a building. You
8 say now, between those two forms of words, there is
9 virtually no difference.

10 MR. HORWICH: Yes.

11 JUSTICE BREYER: The one possible difference
12 is shoplifting.

13 MR. HORWICH: Exactly.

14 JUSTICE BREYER: And as to shoplifting, here
15 is what I would like to say. This is you, okay? Not
16 me.

17 Shoplifting just is not a factor under
18 California code section 459. Now, you have not added
19 those last words; and therefore, I begin to think maybe
20 it is a factor. And if it is a factor, then I'm afraid
21 I'm then leaning in favor of saying there is a big
22 difference in the California statute in generic
23 burglary.

24 But if you could tell me, no, there are
25 other shoplifting statutes, this is never or hardly ever

1 used for shoplifting, then maybe I would feel
2 differently about it, and say, oh, it's close enough.

3 MR. HORWICH: Well, I can't --

4 JUSTICE BREYER: You see why I turn back to
5 the empirical question and keep wondering, why is it not
6 possible to get, say, a law professor; they have spare
7 time -- get the sentencing committee, get someone to
8 look and see what are the real behaviors that are
9 convicted under section 459.

10 MR. HORWICH: I can --

11 JUSTICE SCALIA: And then advise defendants
12 who -- who anticipate committing these crimes, so that
13 they will know which crimes carry another 30 years.

14 (Laughter.)

15 JUSTICE BREYER: Well --

16 MR. HORWICH: Well -- Justice Breyer, I
17 don't think I can give you a statistical survey. The
18 only thing I can offer, and I offer it with some
19 hesitation, is my conversations with California
20 prosecutors suggest that they are, at least today,
21 generally disinclined to charge shoplifting as burglary,
22 because it's a lot easier, and effectively gets them the
23 same result in those cases, to charge it as larceny.
24 Now --

25 JUSTICE GINSBURG: Is that --

1 MR. HORWICH: -- but that's -- that's
2 anecdotal, at best. I don't have anything better.

3 JUSTICE GINSBURG: -- to charge it as what?
4 What's shoplifting?

5 MR. HORWICH: To charge it as larceny,
6 because very often, it will be the completed shoplifting
7 is very hard to prove they had the intent when they went
8 into the store.

9 JUSTICE GINSBURG: But it -- but it does
10 come under this section 459.

11 MR. HORWICH: It does, but it -- in exactly
12 the same way that automobile burglaries come under this
13 statute. The statute is broader as to the place
14 burgled, it's broader as to the types -- types of
15 unlawfulness of entry.

16 That's not a reason not to recognize that
17 when the defendant, as Petitioner did here, says my
18 crime was breaking and entering -- to recognize it as
19 breaking and entering, which is all we think Shepard
20 asks for.

21 And I want to be clear that you wouldn't go
22 beyond that. We're not saying that a defendant who's
23 pleading guilty to criminal trespass who says it was
24 breaking and entering and I intended to go steal
25 something in there, you can't then call that burglary,

1 because the additional admission to intent is not
2 germane to the conviction for criminal trespass. So you
3 can't use that and turn that into generic burglary.

4 That answers the hypothetical that was
5 raised about someone who enters a plea bargain to
6 possession of controlled substances instead of
7 distribution. That -- that answers a great many of the
8 parade of horrors that Petitioner is offering. And
9 that's --

10 JUSTICE SOTOMAYOR: Could you tell me what
11 the difference is between entering the garage with
12 permission and taking a wrench and walking out, and
13 entering a store with permission and taking an article
14 of clothing. Are they both shoplifting?

15 MR. HORWICH: I -- if in your hypothetical
16 the garage is a -- is not your own garage and you don't
17 have the consent of the garage's owner to -- who knows
18 that you're going to take the wrench, no, they are the
19 same. Those are the same thing.

20 JUSTICE SOTOMAYOR: They are the same thing.
21 So in answer to Justice Breyer's question, you do admit
22 that under the California definition of burglary,
23 shoplifting could be charged.

24 MR. HORWICH: Shoplifting could be charged,
25 and someone could plead guilty to shoplifting, and that

1 wouldn't count. The problem here is that --

2 JUSTICE SOTOMAYOR: I think your adversary
3 can speak for himself, and his brief did point to some
4 convictions for shoplifting under the statute.

5 MR. HORWICH: Yes, we agree.

6 JUSTICE SOTOMAYOR: There are some.

7 MR. HORWICH: Absolutely. You can be
8 convicted of shoplifting. We don't disagree with that.
9 But what we're saying is that the approach that Taylor
10 and Shepard suggests is one that focuses on what the
11 defendant necessarily admitted in offering the legal
12 basis for his conviction rather than on hypotheticals
13 about other conduct he might have committed that would
14 have resulted in the same conviction.

15 JUSTICE ALITO: What seems to me perhaps
16 clearest about this case and others is that this
17 modified categorical approach has turned out to be
18 extremely complicated, and occasionally produces results
19 that seem to make no sense whatsoever. Is this
20 inevitable? Is this really what Congress intended, or
21 did the Court create this problem by the way it has
22 interpreted ACCA?

23 MR. HORWICH: If I may, briefly.

24 CHIEF JUSTICE ROBERTS: You can.

25 MR. HORWICH: My sense -- my sense is that

1 this problem is largely the product of lower courts
2 trying to draw very fine formalized
3 angels-on-the-head-of-a-pin distinctions about the
4 statutes, rather than simply focusing on the conduct
5 that was necessarily admitted. And if they would do
6 that, I actually think this would go significantly more
7 smoothly.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Johnson, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF DAN B. JOHNSON

11 ON BEHALF OF THE PETITIONER

12 MR. JOHNSON: Thank you, Mr. Chief Justice.

13 One thing I would like to point. There is a
14 lot of discussion about shoplifting, as if that's one of
15 the only problem areas we have. On page 9 of our reply
16 memorandum, footnote 5 contains a number of examples of
17 other -- California burglaries. And I don't -- it's
18 page 9 of the reply memorandum, footnote 5.

19 California burglary, it's -- those examples
20 are just a few examples how a burglary is consensual
21 entry into homes. That is not an unprivileged entry,
22 and it's not a trespass.

23 I think -- I think that -- limiting it to
24 just saying that -- that shoplifting is the only problem
25 we have, I don't believe that's the case.

1 JUSTICE SOTOMAYOR: Mr. Johnson, the last
2 answer by Mr. Horwich to the last question was, it would
3 be simpler if we hadn't done the modified categorical
4 approach; but the reality is we have a statute. The
5 active statute that defines violent felony not with
6 respect to a felony that involved dangerous conduct, but
7 as any crime punishable by imprisonment that has an
8 element that threatened use of physical force. So it's
9 not what the Court created, it's what the statute
10 created.

11 MR. JOHNSON: I agree with that, and I think
12 that -- I -- I don't think anything has changed in --
13 since -- in the last 22 years for the Court to step away
14 from Taylor. In fact, I think the recent developments
15 and constitutional law six memo rights to trials on
16 factfinding.

17 JUSTICE ALITO: Well, does the offense of
18 burglary have the element of using force or threatening
19 to use of force?

20 MR. JOHNSON: I don't believe it does. I
21 think the theory is that --

22 JUSTICE ALITO: So the element doesn't --
23 the element language doesn't apply to burglary.

24 MR. JOHNSON: I think it does.

25 JUSTICE SCALIA: Well, you don't have to

1 prove -- I mean, burglary is specifically named. It's
2 not -- it's not the residual --

3 MR. JOHNSON: Clause.

4 JUSTICE SCALIA: It's not the residual.
5 The -- the use or threatened use of force is the
6 residual. If you're convicted of burglary, it doesn't
7 matter whether -- whether you threaten force, right?

8 MR. JOHNSON: Well, again, I think if we get
9 into the residual, it's going to require the evaluations
10 the Court have done on that. But modified -- if you --
11 if you look --

12 JUSTICE SCALIA: Do you think only -- only
13 those burglaries that -- that threaten force are covered
14 by the statute? Certainly not. It's all burglaries, as
15 long as you meet the generic definition of burglary,
16 right?

17 MR. JOHNSON: I agree with that. Unless
18 there's other questions, I'd yield the rest of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

23
24
25

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